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In the Supreme Court of the United States

OCTOBER TERM, 1961

NO. 547

JACQUE DURHAM
Appellant

vs.

CITY OF INDIANAPOLIS,
Appellee

STATEMENT AS TO JURISDICTION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

NO. .....

JACQUE DURHAM
Appellant

vs.

CITY OF INDIANAPOLIS,
Appellee

STATEMENT AS TO JURISDICTION

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States

In compliance with Rule 10 of the Supreme Court of the United States, Jacque Durham, Appellant herein, submits herewith his statement, particularly disclosing the basis upon which the Supreme Court of the United States has Jurisdiction on Appeal to review the judgment of the Supreme Court of Indiana entered in this cause.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported in 174 N.E. (2d), page 55. (Opinion rendered May 1, 1961; rehearing denied June 12, 1961.) The case is not yet reported in the Indiana Reports. The opinion of the Supreme Court is Appendix "A", attached hereto.

JURISDICTION

The Appellant was convicted upon a trial by Court, without a jury, which resulted in a finding of guilty upon a charge, by affidavit, of violation of a City Ordinance, to-wit, operating a dive.

The affidavit, in one count, is as follows:

STATE OF INDIANA, MARION COUNTY, SS:
CITY OF INDIANAPOLIS, Plaintiff

vs. In the Municipal Court of

JACQUE DURHAM, Defendant Marion County

THE CITY OF INDIANAPOLIS complains of the said defendant, late of said city, and says that the said Defendant on or about February 1, 1959, at the City and County aforesaid, did then and there violate Section 10-1022 of G. O. 140, 1951, of said City, passed by the Common Council thereof on the 21st day of November 1951, as amended by unlawfully keeping, maintaining, frequently or going to an unlicensed place at 518 North West Street where is kept and which is kept alcoholic liquors, vinous liquors, or narcotics, and where they are sold, dispensed, or disposed of or obtained: or any place where men and women or minors drink intoxicants.

Wherefore the Plaintiff demands judgment for $300.00 dollars and imprisonment for 90 days, as provided by said Ordinance.

MICHAEL B. REDDINGTON, Corporation Counsel
THOMAS F. GIBSON, JR., City Prosecutor

A Motion To Quash was filed, urging that said affidavit was bad for the reason that the facts stated therein do not constitute a public offense, and that the language of the ordinance is not sufficiently specific and certain. A Motion To Suppress Evidence was filed, urging the illegality of the arrest of defendant, and that the search and seizure of defendant's person and property was illegal, and violation of defendant's constitutional rights.

The judgment of the Supreme Court of Indiana was entered on the 1st day of May, 1961, and an order was entered on June 12, 1961, denying a Petition for Rehearing; Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Indiana on June 19, 1961.

The jurisdiction of the Supreme Court of the United States to review the decision and judgment by direct appeal is conferred by Title 28, United States Code Annotated, Section 1257(2).

Cases believed to sustain the jurisdiction of this Court are as follows:

(a) Incompetent counsel and dereliction of attorney's duty to client.

Lunce v. Overlade,
7th Cir. 1957
244 Fed. 2d 108

U.S. ex rel Feeley v. Ragen,
7th Cir., 166 Fed. 2d 976

Napue v. Illinois,
360 U.S. 264

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14th Amendment to the Constitution of the United States

Article 1, Section 13, of the Constitution of the State of Indiana

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210 Ga. 262

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Hendrickson v. Overlade, D.C. Ind.,
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(b) Withdrawal of counsel from case and insufficient time for new counsel for a proper representation of client.

Collins v. Commonwealth,
143 Ky. 60

People v. McLaughlin,
291 N.Y. 480,
53 NE 2d 356

Garrett v. State,
248 Ala. 612

Williams v. State,
192 Ga. 247

Ex parte Hough,
150 Pac. 2d 448

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Bradley v. State,
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146 Fed. 2d 244

Andrews v. Robertson,
145 Fed. 2d 101

In re Stevens,
160 Pac. (2d) 415

White v. Ragen,
324 U.S. 760

Adamson v. People of California,
67 S. Ct. 1672

(c) Due process must be afforded defendant on appeal and the validity of the conviction must be appraised in consideration of the case thereon as it was tried and as the issues were determined in the trial court.

Cole v. State of Arkansas,
333 U.S. 196

(d) Grounds to be considered on a Petition for Rehearing may include new questions or issues if the circumstances are exceptional, and may include

(1) Manifest injustice to Appellant.

Cleveland etc. R. Co. v. Lynn,
171 Ind. 589

In re. Warren Estate,
74 Ariz. 385

Ex parte Cooke,
263 Ala. 481

(2) If the circumstances are exceptional.

Kane v. Lenoble,
82 N.Y.S. 2d 259

State v. Sexton,
11 S.D. 105

(3) Public interest is involved because of validity of ordinance.

People v. Marine Products Co.,
77 C.A. 2d Supp. 929

Vickers v. State,
176 Ind. 415

First Trust & Savings Bank of
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(4) Where fundamental error is apparent on the face of the record.

Ambrose v. Alioto,
150 P. 2d 502

Vogel v. Bristol,
98 NE 2d 529,
343 Ill. App. 145

Carroll v. Sartain, Civ. App.,
164 S.W. 2d 52

Davis v. Morris, Civ. App.,
257 S.W. 328

Gaertner v. Stolle, Civ. App.,
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Skaggs v. City of Los Angeles,
291 P. 2d 572

Delta Cotton Oil Co. v. Elliott,
174 So. 550,
179 Miss. 200

(e) City ordinance involved is vague, indefinite and uncertain.

Winters v. New York,
333 U.S. 507

Herndon v. Lowry,
301 U.S. 242

Stomberg v. California,
283 U.S. 359

(f) There must be an ascertainable standard of guilt.

Pierce v. U.S.,
314 U.S. 306

Connelly v. General Construction Co.,
269 U.S. 385

United States v. L. Cohen Grocery,
255 U.S. 81

(g) City ordinances, like state statutes, must use words of determinative meaning.

United States v. Resnick,
299 U.S. 267

Donnelly v. United States,
276 U.S. 305

Webster's New International
Dictionary

The Winston Dictionary, College
Edition (1947)

Callaher v. State,
193 Ind. 629

Smithe v. State,
186 Ind. 252

Moore v. State,
183 Ind. 114

Hedderich v. State,
101 Ind. 564

5th Amendment to the United States
Constitution

6th Amendment to the United States
Constitution

Alford v. United States,
282 U.S. 687

The text of the city ordinance, being Section 10-1022 of G.O. 140 (1951) City of Indianapolis, Marion County, Indiana, reads as follows:

"Keeping and Frequenting dives—(1) Any unlicensed place where alcoholic, malt or vinous liquors, or narcotics, are kept, sold, dispensed or disposed of, and where men and women, or minors, are permitted to come and drink, or to obtain, alcoholic, malt or vinous liquors, or to use, or obtain narcotics, either in the place or room where such liquors or narcotics are kept, sold, dispensed, or disposed of, or in a place of business or other place connected therewith, or in a place not directly connected with such place, but where such liquors, or narcotics, are kept, sold, dispensed, delivered, or disposed of for any such purposes; or any place where

men and women, or minors, drink intoxicants, or use narcotics, or commit, or aid and abet others therein to commit any acts of immorality in any such place; or any place where men or women, or minors, loiter, or idle away their time, without visible means of support and do not do any work, shall, in each of such instances, be known as a "dive."

(2) It shall be unlawful for any person to keep or maintain such a place; and it shall also be unlawful for any person to go to or frequent any such place, to engage in, or to aid and abet other persons to engage in any of the purposes aforesaid, or for any person without visible means of support, or who does not do any work, to go to any such place for the purpose of loitering, or idling away his time, or for any person at such place to commit or aid and abet others in committing any acts of immorality.

(3) Any person convicted of violating any provision of this section shall be fined or imprisoned, or both, as provided in the general penalty section of this chapter."

QUESTIONS PRESENTED

The questions presented in this appeal are as follows:

(a) Whether the quality of representation afforded to the petitioner, both in his trial in the Circuit Court of Marion County, Indiana, and in his subsequent appeal and or attempted appeal to the Supreme Court of Indiana, was of such a nature as to constitute a denial of due process of law.

(b) Whether the City of Indianapolis' reliance upon a low quality of representation of counsel to sustain a conviction on appeal is a denial of due process of law.

(c) The erroneous holding and ruling of the Indiana Supreme Court which denied Appellant his constitutional rights as guaranteed him under the 14th Amendment to the Constitution of the United States with particular em-

phasis on Due Process of Law, more particularly as follows, to-wit:

(1) The Court erred in denying the Belated Appeal because of the following grounds and for the following reasons, to-wit:

-a- The failure and refusal of the Court to grant said Verified Motion to Grant Time to Perfect Appeal resulted in a gross miscarriage of justice.

-b- Incompetence of counsel in the preparation and filing of the record and transcript which resulted in failure to correct and perfect the record before submission of the cause, all without fault or blame on the part of Appellant.

-c- Incompetence of counsel in failing to present the case timely, properly and sufficiently for a full and complete consideration thereof by the Indiana Supreme Court, all without fault or blame on the part of Appellant Durham.

-d- The Court ruled on a Motion To Dismiss without affording appellant sufficient time to employ counsel and file briefs in opposition to the Motion To Dismiss, and as a result thereby Appellant's attempts to cure the error therein by his Motion for An Extension of Time to File Brief and to Employ Counsel were fruitless.

-e- Accident and surprise perpetrated on Appellant by the actions of his counsel, George R. Brawley, in leaving the continental United States and going to Switzerland, Europe, and abandoning said Appeal, all of which rendered Appellant helpless and prevented him from asserting, defending and protecting his constitutional rights which he claims were violated by the actions of the Trial Court, all without fault or blame on the part of Appellant.

(2) The Indiana Supreme Court erred in dismissing said Appeal for the reason that Appellant was precluded

and prevented from correcting the errors alleged in the Motion To Dismiss because of the incompetence of former counsel and the gross dereliction of duty by former counsel (Brawley), all as shown by the Appellant's Motion for an Extension of Time to File Brief and to Employ Counsel and Appellant's Verified Motion To Grant Time to Perfect a Belated Appeal, which resulted in the following—

-a- Defect in the proceedings in the Trial Court on relevant and germane matters which are conditions precedent to the timely and proper taking of an Appeal.

-b- Because of defects in perfecting the Appeal.

-c- Because Appellant Durham has been compelled to change counsel twice while the litigation was pending, both at the time immediately after the overruling of the Motion For New Trial in the trial court and at the time of the filing of the Petition for Rehearing by the Indiana Supreme Court, all of which deprived him of due process of law and equal protection of the law and wherein he was precluded from presenting, asserting, protecting and preserving his constitutional rights as aforesaid.

STATEMENT OF THE CASE

On or about February 2nd, 1959, the City of Indianapolis, by William D. Keough, a police officer, filed an affidavit against Appellant, Jacque Durham, in one count, charging him with operating a dive. The affidavit, omitting the caption and formal parts, reads as follows, to-wit:

(See Page 2, under heading "Jurisdiction")

Before the entry of a Plea of Not Guilty the defendant filed a Motion To Quash the affidavit on the following grounds:

1. That the facts stated in the affidavit do not constitute a public offense.

2. That the affidavit does not state the offense with sufficient certainty,

which Motion was overruled, and the defendant thereafter filed a Motion To Supress the evidence in this action for the following reasons, to-wit:

A. That the arrest of the defendant is illegal, and

B. That the search and seizure of defendant's person and property was illegal, and in violation of defendant's constitutional rights.,

which Motion was overruled.

Trial was had before the Marion Circuit Court, without a jury, which resulted in a finding of guilty as stated in the affidavit. The judgment rendered by the Court was as follows:

> The Court now sentences the defendant, Jacque Durham, to pay a fine of Two Hundred and Fifty ($250.00) Dollars and costs, and sentenced to 90 days in the Marion County Jail.

The Motion For New Trial was timely and properly filed and omitting the caption and formal parts, reads as follows, to-wit:

Comes now Jacque Durham, defendant in the above entitled cause, and moves the Court for a new trial thereof, on each of the following grounds:

I.

Irregularities in the proceedings of the court, and abuse of discretion by which the defendant was prevented from having a fair trial, in this, to-wit:

A. That the court overruled the defendant's Motion to Quash which Motion to Quash was on the following grounds:

1. That the facts stated in the affidavit do not constitute a public offense.
2. That the affidavit does not state the offense with sufficient certainty.

II.

Errors of law occurring at the trial excepted to by the

defendant, which errors of law prevented the defendant from having a fair and impartial trial, in this, to-wit:

A. That the Court erred in overruling the defendant's Motion to Quash, which Motion to Quash was based on the following grounds:

1. That the facts stated in the affidavit do not constitute a public offense.
2. That the affidavit does not state the offense with sufficient certainty.

B. That the court erred in overruling the defendant's Motion to Suppress, which Motion to Suppress was based upon the following grounds:

1. That the arrest of the defendant was illegal,
2. That the search and seizure of the property of the defendant was illegal, and in violation of his constitutional rights.

III

That the verdict or decision was not sustained by sufficient evidence, and is contrary to law.

Wherefore, the defendant prays the Court for a new trial of said cause.

Signed: George R. Brawley

George R. Brawley
Attorney for Defendant.

which Motion for New Trial was overruled by the Trial Court, the Marion Circuit Court.

Appellant thereupon appealed the judgment of the Trial Court, the Circuit Court of Marion County, to the Supreme Court of Indiana, and assigned as errors therein the following assignment of errors, to-wit:

The Appellant urges his assignment of errors, namely That the Court erred in overruling Appellant's Motion to

Quash, Appellant's Motion to Suppress evidence, and Apellant's Motion for New Trial.

WHEREFORE, appellant prays the judgment of the trial Court be reversed and the cause be remanded with instructions to sustain appellant's Motion for New Trial.

s George R. Brawley
GEORGE R. BRAWLEY
Attorney for Appellant

On May 1, 1961, the Supreme Court of Indiana dismissed the Appeal of Appellant in Cause No. 30,030, and in Cause No. 30,084 the Supreme Court of Indiana denied the Petition for a Belated Appeal. The Appellant timely and properly filed a Petition for Rehearing in both causes, which was denied by the Supreme Court of Indiana on the 12th day of June, 1961, and it is from this decision and judgment, in both causes, that this Appeal is taken, prosecuted and presented to this Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The Federal questions are substantial and were timely and properly raised in the Trial Court by the Motion to Quash and the Motion to Suppress Evidence, and thus the due process of law clause of the 14th Amendment to the Constitution of the United States and Article I, Section 13 of the Constitution of the State of Indiana is drawn in question here.

The law in question was a city ordinance of the City of Indianapolis.

All during the trial in the Trial Court appellant timely and properly raised Federal questions, but appellant's counsel, who acted as his attorney in the trial of said cause in the Circuit Court of Marion County, was certainly totally and wholly incompetent to handle and prosecute the appeal to the Supreme Court of Indiana, and it is interesting to

note that after his attempts at appeal to the Indiana Supreme Court and his pseudo submission of said cause in the Supreme Court of Indiana, he suddenly left the continental United States and went to Switzerland, Europe, leaving behind scattered portions and remnants of the data, briefs, portions of the transcript, and material for the presentation of the appeal in question.

This August Tribunal's attention is directed to the incompetence of counsel and the dereliction of attorney's duty to client as the main grounds for this Appeal, and this Court is respectfully urged to consider the case of Cole v. State of Arkansas, 333 U.S. 196 (1948), wherein the Court held, in substance, that proceedings in a State Supreme Court are a part of the process of law under which the petitioner's convictions must stand or fall.

The Indiana cases with reference to incompetence of counsel are unanimous in holding that there can be no valid judgment of conviction against an accused unless he was adequately defended by counsel.

"And merely perfunctory action by an attorney to represent one accused of crime, which falls short of presenting the evidence favorable to him and invoking the rules of law intended to prevent conviction for an offense for which the accused is innocent and the imposition of a penalty more severe than is deserved should not be tolerated."

Castro v. State (1925)
196 Ind. 385

"It has been said that the language of each provision of the constitution is to be considered as though every word had been hammered into place."

State ex. rel. Noble (1888)
118 Ind. 350

"Under constitutional requirement that accused be properly and adequately represented, adequate representation cannot be based upon the number of witnesses called or the

mere fact that an objection should or should not have been made to certain instructions or certain questions propounded but must be based upon the preparation for trial, handling of trial and necessary steps for appeal."

Stice v. State (1950)
228 Ind. 144

"If an accused elects to stand trial his counsel should vigorously present every legal defense and represent him with his utmost skill and ability, and anything short of this is not adequate representation by counsel which under the constitutional commands shall be afforded."

Abraham v. State (1950)
228 Ind. 179

This Court has stated in the case of Wilson v. State, 222 Ind. 63, that where there had been such a lack of representation of defendant by counsel as to be equivalent to or worse than no representation at all, and as a result thereof the judge misused the opportunity thus given to impress upon the jury his view that the defendant was guilty and ought to be convicted, appellate court would remand the cause for such a trial as would not deny but would afford to defendant the protection of his constitutional rights.

The federal and state constitutions guarantee a fair and impartial trial to every accused and due process of law guarantees adequate and competent representation by counsel.

The Constitution of Indiana,
Article I, Section 13
The Constitution of the United
States, Amendment 14

It is earnestly hoped that this Court will not overlook appellant's Motion for Extension of Time to File Brief and Employ Counsel filed April 7, 1961, on behalf of appellant which was denied by the Supreme Court of Indiana, and in connection with this we cite the following:

Right to assistance of counseling is denied to a defender unless he gets reasonable time and a fair opportunity to secure counsel of his own choice and with that counsel's assistance to prepare for trial; and no last minute peremptory assignment of counsel will serve, particularly when made at such a time and under such circumstances as practically to preclude the giving by counsel to prisoner and prisoner to counsel of effective aid in the preparation of the case.

People v. McLaughlin,
291 N. Y. 480
53 N.E. (2d) 356

Bradley v. State
227 Ind. 131

Constitution of the United
States, 14th Amendment, Sec. 1

Wilson v. State,
(Supra)

In Lunce v. Overlade, 7 Cir., 1957, 244 F. 2d 108 the United States Court of Appeals for the Seventh Circuit reversed and remanded for a hearing a case in which the petitioners in a federal court sought relief from a judgment in a state court by way of habeas corpus. The petitioners claimed a denial of due process through the inadequacy of their representation by counsel. The District Court disposed of this claim on the basis that the petitioners were represented by counsel of their own choice. In reversing this ruling the Court of Appeals said:

"* * * As a rule, an accused cannot proceed to trial with counsel of his own choice and later claim a denial of due process chargeable to the state because of errors committed by such counsel. See United States ex rel. Darcy v. Handy, 3 Cir., 203 F. 2d 407, certiorari denied sub nom. Maroney v. United States ex rel. Darcy, 346 U.S. 865, 74 S. Ct. 103, 98 L. Ed. 375, and cases cited

therein. However, where the representation of an accused by his counsel is so lacking in diligence and competence that the accused is without representation and the trial is reduced to a sham, it is the duty of the state to see that the essential rights of the accused are preserved by appropriate intervention. United States ex rel. Darcy v. Handy, supra; United States ex rel. Feeley v. Ragen, 7 Cir., 166 F. 2d 976. In the instant case the incompetence of the defense was so apparent as to call for intervention by the officers of the state but nothing was done. * * * (O)our concern here is the state's deprivation of petitioners' rights under the Fourteenth Amendment by denying them that fundamental fairness without which no conviction can stand."

The representation afforded appellant in this cause is so foul of stench that it would be offensive to the dignity of this Court to attempt to explain the gross dereliction of duty by counsel which resulted in the miscarriage of justice to appellant, but to assist us here we quote Justice Frankfurter in Adamson v. People of California, 67 S. Ct. 1672, as follows:

"The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."

We further quote this Court in the case of Napue v Illinois, 360 U.S. 264, 79 S. Ct. 1173 (1959) where this Court stated that "reliance by the state on a low quality of representation by counsel for an accused in order to obtain a conviction is equivalent to relying on perjured testimony."

Certainly the quality of the legal representation afforded to appellant by his former counsel was of such a nature as to amount to a denial of counsel and the shreds and remnants of the record in this cause brought up from the office of the Clerk of the Supreme Court of Indiana is mute evidence to this assertion.

This Court is not bound by the decision of the Supreme Court of Indiana where a constitutional right is involved, but will examine the record to determine whether the right was denied, in substance, as well as if directly and specifically denied as was done in this case.

> "We concede the proposition, so earnestly urged on behalf of the plaintiff in error, that by the Fourteenth Amendment it is made the right and the consequent duty of this Court, when a case has been duly brought before it, to inquire whether, in the enactment and administration of the criminal laws of a state, it is sought to arbitrarily deprive any person of his life, liberty or property, or to refuse him the equal protection of the laws, and that such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a state court in pursuance of the provisions of a state statute."
>
> Hodgson v. State, 168 U.S. 262,
> 42 L. Ed. 461,
> 18 S. Ct. 80

This same rule has been quite recently restated.—

> "When a Federal right has been specially set up and claimed in a state court, it is our province to inquire not

merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding constitutional rights.

Norris v. Alabama,
294 U.S. 587, L. Ed. 1075,
55 S. Ct. 579

In the case of Cole v. State of Arkansas, 333 U.S. 196, this Court said as follows:

"To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court. Furthermore, since Arkansas provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the part of the process of law under which the petitioners' convictions must stand or fall. Frank v. Mangum, 237 U.S. 309, 327, 35 S. Ct. 582, 587, 59 L. Ed. 969. Cf. Mooney v. Holohan, 294 U.S. 103, 113, 55 S. Ct. 340, 342, 79 L. Ed. 791, 98 A.L.R. 406. That court has not affirmed these convictions on the basis of the trial petitioners were afforded. The convictions were for a violation of 2. Petitioners urged in the State Supreme Court that the evidence was insufficient to support their conviction of a violation of 2. They also raised serious objections to the validity of that section under the Fourteenth Amendment to the Federal Constitution. None of their contentions were passed upon by the State Supreme Court. It affirmed their conviction as though they had been tried and convicted of a violation of 1 when in truth they had been tried and convicted only of a violation of a single offense charged in 2, an offense which is distinctly and substantially different from the offense charged in 1."

Appellant in his Petition for Rehearing, by different counsel, raised some questions with reference to the correct-

ness of the ruling of the Indiana Supreme Court with reference to the dismissal of appeal and the ruling of the Supreme Court of Indiana with reference to the denial of the belated appeal, but this Court's attention is respectfully directed to appellant's Motion for an Extension of Time to File Brief and Employ Counsel filed in the Supreme Court of Indiana on April 7, 1961; the relevant parts of said Motion being paragraphs 4 and 5 thereof, which reads as follows:

> "4. That the said George R. Brawley did not properly prepare his said appeal, left the City and State on March 13th, 1961, without informing this petitioner and that he has made a diligent search and inquiry for the said George R. Brawley, but finds that the only information as to the whereabouts of the said George R. Brawley is that he is out of the continental United States and somewhere in Europe.
>
> "5. That he was never informed by the said George R. Brawley, that he had not completed his employment and that after hearing that the said George R. Brawley had left the State he called the Clerk of this Court on March 14, 1961, and was informed that the appeal brief was due on that day."

This Court has held in the case of Carter v. Illinois, 329 U.S. 173, that "Although an accused may have been denied the assistance of counsel under circumstances which constitute an infringement of the United States Constitution and, if the state affords no mode for redressing that wrong, he may come to federal courts for relief, but where a remedy is provided by the state, a defendant must first exhaust it in the manner in which the state prescribes."

This Court has further held in the cases of Roberts v. Hunter, 140 F (2d) 38; Andrews v. Robertson, 145 F (2d) 101; and Potter v. Dowd, 146 F (2d) 244, that "If defendant in criminal prosecution was deprived of his constitutional right to the assistance of counsel, resulting in the depriva-

tion of a fair and impartial trial, the judgment and sentence is void and habeas corpus is available to test that question.

"The purpose of the constitutional guaranty of the effective assistance of counsel is to protect an accused from conviction resulting from his ignorance of his legal and constitutional rights, and assure him the guiding hand of counsel at every step in the proceedings."

Roberts v. Hunter
(Supra)
Potter v. Dowd,
(Supra)

This Court has further said in the case of House v. Mayo, 324 U.S. 42, and in the case of White v Ragen, 324 U.S. 760, that "Due process requires that a defendant on trial in a state court upon a serious criminal charge and unable to defend himself shall have the benefit of counsel, and it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel.

"The right to counsel in state criminal prosecutions is a right protected by this amendment, and the question of whether or not that right has been infringed is not foreclosed in the United States Supreme Court, even though the action of the state court was on the ground that its statute requiring the appointment of counsel was not violated."

Williams v. Kaiser,
323 U.S. 471

Reference is further made to the case of Wilson v. State, 222 Ind. 63, wherein this Court held that "The defeated litigant in every or the usual case where his attorney has ignorantly or carelessly failed to save and present an error may nevertheless have it reviewed and made the basis of reversal of the judgment, but where it is made to appear that a so-called trial did not meet the requirements of due process of law, it is within the power of the state supreme

court to take cognizance of the errors that resulted in depriving defendant of his constitutional rights. In a case involving defendant's life or liberty, state supreme court may not ignore prejudicial errors affecting his constitutional rights when they are clearly presented in defendant's brief with supporting bill of exceptions, and should not merely examine motion for new trial, and, not finding the errors relied upon mentioned therein, affirm judgment against defendant."

CONCLUSION

It is respectfully urged that the appellant, Jacque Durham, did not receive that competence and diligence by counsel that this Court has repeatedly held an accused must have. Again we quote Lunce v. Overlade, 7 Cir., 1957, 244 F. 2d 108, wherein the Court held that "However, where the representation of an accused by his counsel is so lacking in diligence and competence that the accused is without representation and the trial is reduced to a sham, it is the duty of the state to see that the essential rights of the accused are preserved by appropriate intervention. United States ex rel. Darcy v. Handy, supra; United States ex rel. Feeley v. Ragen, 7 Cir., 166 F. 2d 976. In the instant case the incompetence of the defense was so apparent as to call for intervention by the officers of the state but nothing was done. * * * (O)our concern here is the state's deprivation of petitioners' rights under the Fourteenth Amendment by denying them that fundamental fairness without which no conviction can stand."

In the instant case, we believe that the Supreme Court of Indiana abused its discretion when they denied and refused appellant's Motion for an Extension of Time to File Brief and Employ Counsel. This motion was filed on April 7, 1961. We further say that we believe that the Supreme Court of Indiana abused its discretion when it denied and

refused appellant's Verified Petition to Grant Time to Perfect a Belated Appeal, filed April 10, 1961.

It is respectfully urged that the incompetence of the defense counsel was so apparent, and we quote from rhetorical paragraph 4 of appellant's Motion for Extension of Time to File Brief and Employ Counsel,

> "4. That the said GEORGE R. BRAWLEY did not properly prepare his said appeal, left the City and State on March 13th, 1961, without informing this petitioner, and that he has made a diligent search and inquiry for the said GEORGE R. BRAWLEY, but finds that the only information as to the whereabouts of the said GEORGE R. BRAWLEY is that he is out of the continental United States and somewhere in Europe.",

that it was the duty of the Supreme Court of Indiana to permit appellant sufficient time to file brief and employ counsel.

The appellant's Verified Motion to Grant Time to Perfect a Belated Appeal shows that appellant's attorney, George R. Brawley, left the continental United States and went to Switzerland, Europe, and that scattered portions of his brief and notes and partial bits of the transcript and Bill of Exceptions were found piled in a corner of Brawley's office.

In conclusion, it is respectfully but vehemently urged that the Supreme Court of Indiana erred in denying appellant's Petition for Rehearing for the reasons therein stated, with particular emphasis on the foregoing paragraphs, which showed not only a lack of competence and diligence, but an outright abandonment of appellant by counsel, which prevented due process of law as guaranteed defendant by the Fourteenth Amendment to the Constitution of the United States.

The questions raised in this appeal are so substantial as to deserve plenary consideration by this Court with opportunity for briefs and a hearing on the merits.

Respectfully submitted.

WILLIAM C. ERBECKER,
312 E. Washington Street
Indianapolis, Indiana
Attorney for Appellant.

APPENDIX "A"

George R. Brawley
Indianapolis, Indiana
Attorney for Appellant

Michael B. Reddington
Corporation Counsel
John J. Dillon
City Attorney
Thomas F. Gibson
City Prosecutor
Attorneys for Appellee

IN THE
SUPREME COURT OF INDIANA

JACQUE DURHAM,
Appellant

vs.

CITY OF INDIANAPOLIS,
Appellee.

No. 30,030

Filed May 1, 1961

Alice C. Whitecotton, Clerk

Chavis & Crowdus
Indianapolis, Indiana
Charles A. Walton
Indianapolis, Indiana
Attorneys for Appellant

Michael B. Reddington
Indianapolis
Counsel for Appellee

IN THE
SUPREME COURT OF INDIANA

JACQUE DURHAM,
Appellant

vs.

CITY OF INDIANAPOLIS,
Denominated as
Appellee.

No. 30,084

APPEAL FROM THE MARION CIRCUIT COURT
HON. JOHN L. NIBLACK, JUDGE

ARTERBURN, J.

In the first above entitled case the City of Indianapolis has made a motion to dismiss the same on the ground that the bill of exceptions included in the transcript was never filled with the clerk of the trial court or evidenced by any order book entry; that no assignment of errors is attached to the transcript, that the brief has major defects, among them a failure to make a concise statement of the record therein. For the reasons stated, there has been a failure to properly perfect an appeal in this case. The motion to dismiss is sustained.

In the second above entitled case the appellant, apparently recognizing a failure to perfect the appeal in time, has filed a motion for a belated appeal, alleging in substance a failure of his attorney to take the proper steps within the proper time for perfecting the appeal.

We have previously held that a mistake or error of a party's attorney as to the time limitations for an appeal is no excuse for grounds for a belated appeal.

Deckard v. State (1960), ____Ind.____,
170 N.E.2d 424.

For the reasons stated, the petition for a belated appeal is denied.

BOBBITT, C.J. AND LANDIS,
ACHOR AND JACKSON, JJ. CONCUR.

APPENDIX "B"

State of Indiana)
) SS
County of Marion)

In the Supreme Court of Indiana
Cause No. 30030

Filed April 7, 1961
Alice C. Whitecotton, Clerk

Jacque W. Durham
Appellant,

vs.

City of Indianapolis
Appellee,

APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE BRIEF AND TO EMPLOY COUNSEL

JACQUE W. DURHAM, being first duly sworn upon his oath deposes and says:

1. That he is the appellant in the above entitled cause now pending before the Supreme Court of Indiana which said cause arises from a judgment of the Circuit Court of Marion County, Indiana.

2. That on or about the 11th day of August, 1960, the said Circuit Court denied this petitioner's Motion for New Trial; that during the entire pendency of said cause this petitioner retained the services of GEORGE R. BRAWLEY an Attorney both for the purpose of representing him in the trial below and of perfecting his said appeal.

3. That he paid to the said GEORGE R. BRAWLEY his fee of in excess of Five Hundred Dollars.

4. That the said GEORGE R. BRAWLEY did not properly prepare his said appeal, left the City and State on March 13th, 1961, without informing this petitioner and that he has made a diligent search and inquiry for the said GEORGE R. BRAWLEY, but finds that the only information as to the whereabouts of the said GEORGE R. BRAWLEY is that he is out of the continental United States and somewhere in Europe.

5. That he was never informed by the said GEORGE R. BRAWLEY, that he had not completed his employment and that after hearing that the said GEORGE R. BRAWLEY had left the State he called the Clerk of this Court on March 14, 1961, and was informed that the appeal brief was due on that day.

6. That he immediately went to the office of his counsel and tried to meet the deadline for the filing of said brief by working himself together with a lawyer who had subleased the space left by the said GEORGE R. BRAWLEY, and with a public Stenographer.

7. That after he filed the said brief the City of Indianapolis filed a Motion to Dismiss together with a brief and that he has been given to April 9, 1961, to answer the said City's Motion to Dismiss which Motion raises questions of fact which the petitioner knows nothing about and is incompetent to investigate himself or to file said answer.

8. That he has been denied his fundamental constitutional rights to be represented by counsel by the actions of the said counsel and that he will be able to employ as counsel CHAVIS & CROWDUS and CHARLES A. WALTON, if given time by this Court and if the same is given him he will be able to investigate the facts herein and fully protect his rights.

9. That he requests an extension of six (6) weeks herein.

JACQUE W. DURHAM, Affiant

SUBSCRIBED and SWORN to before me this
7th Day of April, 1961.

Thomas M. Crowdus—Notary Public,
Marion County, Indiana

(Seal)

MY COMMISSION EXPIRES:
5 25 64.

I hereby Certify that I have mailed a Copy of this Petition to MICHAEL R. REDDINGTON, Counsel for the Appellee this 7th day of April 1961, at City Hall, Indianapolis, Indiana.

/ JACQUE W. DURHAM.

APPENDIX "C"

JACQUE DURHAM

vs

CITY OF INDIANAPOLIS

No. 30,030 & 30,084

You are hereby notified that the SUPREME Court has on this day denied petition for Rehearing. (without opinion).

FREDERICK LANDIS, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 12th day of June, 1961.

Alice C. Whitecotton By M. Kruse
Clerk Supreme and Appellate Courts

Return this portion.

I hereby acknowledge receipt of the above notice

----------196___.

w-: 6 12 61

No. 30,030 & 30,084

cc:

Chavis & Crowders, Indianapolis
Charles A. Walton, Indianapolis
Wm. C. Erbecker, Indianapolis
Michael B. Reddington—Thomas F. Gibson, Indianapolis

Attorney for